317 US # 16
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. [redacted] 107

16

MARY BOYD EVANS,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

No. [redacted] 108

KATHARINE BOYD MOREHEAD,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

The undersigned counsel, on behalf of Mary Boyd Evans and Katharine Boyd Morehead, prays that writs of certiorari issue to review the decrees of the Circuit Court of Appeals for the Third Circuit entered March 2, 1942.

Opinions Below.

The opinions of the Board of Tax Appeals (R. 7-16) are reported in 42 B. T. A. 851. The opinion of the Circuit Court of Appeals (R. 54-59) is reported in 126 F. (2d) 270.

Jurisdiction.

The jurisdiction of this Court is invoked under section 347 of the United States Code (Judicial Code, § 240 as amended) and section 1141 of the Internal Revenue Code. The decree of the Circuit Court of Appeals was entered March 2, 1942.

Question Presented.

Whether the income of certain trusts is taxable to the trustee or to the petitioners.

Statutes Involved.

Sections 166 and 167 of the Revenue Acts of 1934 and 1936 were relied upon by the Circuit Court of Appeals as the basis of its decision. The pertinent parts of those sections provide:

> "Sec. 166. Revocable Trusts.
>
> "Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—
>
> (1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or
>
> (2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,
>
> then the income of such part of the trust shall be included in computing the net income of the grantor."

"SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

"(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) * * *

then such part of the income of the trust shall be included in computing the net income of the grantor.

"(b) As used in this section the term 'in the discretion of the grantor' means 'in the discretion of the grantor either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question.' "

Sections 161 and 162 of the Revenue Acts of 1934 and 1936, relied on by petitioners, provide:

"SEC. 161. IMPOSITION OF TAX.

"(a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, * * *

(3) * * *

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for the benefit of the grantor). For return made by beneficiary, see section 142."

"Sec. 162. Net Income.

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that

(a) * * *

(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries * * * but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *

(c) * * * in the case of income which, in the discretion of the fiduciary may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the * * * trust the amount of the income of the * * * trust for its taxable year, which is properly paid or credited during such year to any * * * beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the * * * beneficiary."

Statement.

The petitioners, who are sisters, executed identical trust instruments under the same conditions. For simplicity a single case will be described.[1]

Mrs. Boyd, under her husband's will, had a life interest (with power of sale) in his property which consisted almost entirely of 500 shares of stock of the Journal Company. After her death the remainder would go to her daughters (the petitioners).

Over a period of about three years prior to 1931, Mrs. Boyd considered the advisability of placing in trust, during her lifetime, a portion of the 500 shares of Journal Company stock for the protection and benefit of each of her two daughters and their children. Originally Mrs. Boyd planned to create a trust of her life interest and have petitioner make a supplementary trust of her remainder (R. 44).

In the fall of 1931, after several conferences with members of the family and her attorneys, Mrs. Boyd proposed to transfer her life interest in 166 shares of Journal Company stock to petitioner, with the understanding that petitioner would immediately thereafter execute a trust instrument which Mrs. Boyd had caused to be drawn for her to sign as grantor, and petitioner agreed to such proposal.[2]

The proposal was carried out and petitioner executed the trust instrument, prepared in accordance with Mrs. Boyd's ideas which were, *inter alia*: (1) to provide a sufficient income for the maintenance of petitioner for life and

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[1] The findings of fact made by the Board appear at pp. 8-13 of the record. The testimony of petitioners' witnesses was undisputed.

[2] R. 9.

thereafter for her children, and (2) to provide for the accumulation out of income of a fund to build up the corpus so as to guard against possible subsequent worthlessness of the Journal stock.[3]

The trust is irrevocable and contains a typical "spendthrift" clause [4] prohibiting anticipation or assignment by any beneficiary. It provides for the accumulation of part of the income and the payment of the balance to petitioner (subject to the right in petitioner to split off shares of her interest for the benefit of her children).[5] After petitioner's death the income and eventually the corpus goes to petitioner's issue.[6]

The trust instrument contains the following provision, which was the basis of respondent's contentions:

> "10. If, during the continuance of this trust, the income currently payable hereunder to or for the benefit of any beneficiary, together with his or her income from other sources, should be insufficient to properly provide for the support, maintenance, benefit and/or education of such beneficiary and his or her dependents, Trustee is authorized and empowered, in its sole discretion, to pay over unto or for the benefit of such beneficiary so much of the principal of any part or the whole of the trust fund from which such beneficiary may then be receiving the income or the benefit thereof, as may from time to time be required to make up such insufficiency of income. The receipt of any beneficiary for or evidence of the application to the benefit of any beneficiary or any payment made in conformity with the foregoing provision shall fully discharge Trustee from any further liability in connection therewith." [7]

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[3] R. 10.

[4] ¶ 9, R. 11.

[5] R. 11.

[6] R. 11.

[7] R. 11-12.

The trustee never made any distribution to petitioner under this provision.[8] And the Board of Tax Appeals found as a fact that—

> "During the taxable years each of the petitioners was the owner of separate property and had income other than that received from the trusts. At no time from the creation of the trusts to the end of the year 1936 has the income of either of the petitioners, by distributions of income from the trusts and from other sources, been insufficient to properly provide for her support, maintenance, benefit, and/or education, or for that of her dependents."[9]

In the taxable years in litigation the trustee accumulated certain income under the provision for accumulation, and distributed the balance to petitioner. The part distributed to petitioner was reported by her as part of her income. The accumulated part was reported by the trustee as income taxable to the trust. The respondent added the accumulated income to petitioner's taxable income and determined a deficiency in tax[10] on the theory that under Section 10 of the trust agreement the petitioner was able at any time to have the income, which was being accumulated, paid to her, or to recapture the corpus, and that, accordingly, the accumulated income was taxable to petitioner under Section 166 or Section 167 of the Revenue Acts.

The Board of Tax Appeals decided otherwise, holding that Section 10 of the trust instrument was only operative in a contingency not within petitioner's control, and that such contingency had not occurred, and accordingly that Sections 166 and 167 of the statutes were inapplicable. The Board found the facts with respect to Mrs. Boyd's con-

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[8] R. 12.

[9] R. 12.

[10] R. 13.

tribution of her life estate to the corpus of the trust on condition that petitioner execute the prepared instrument, but did not pass on petitioner's contention that Mrs. Boyd and not petitioner was the real grantor.

The Circuit Court of Appeals reversed the Board, holding (1) that petitioner was at all times in a position to take all of the income or to recapture all of the corpus of the trust, and (2) that petitioner was the real grantor within the meaning of the statute although Mrs. Boyd had transferred her life estate to petitioner on the express condition that petitioner execute the prepared trust instrument.

Specification of Errors.

The Circuit Court of Appeals erred in each case:

(1) In holding that the petitioner was the real grantor of the trust, with respect to income derived from Mrs. Boyd's life interest.

(2) In upsetting a finding of fact made by the Board of Tax Appeals.

(3) In holding that the income accumulated by the trustee was taxable to the petitioner.

(4.) In reversing the decision of the Board of Tax Appeals.

Reasons for Granting the Writs.

(1) There is a direct conflict between the decision of the Circuit Court of Appeals in these cases and that of the Circuit Court of Appeals for the Sixth Circuit in *Buhl* v. *Kavanaugh*, 118 F. (2d) 315 (1941). The decision herein is also in conflict with the reasoning of this Court in *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, and that of the Circuit Court of Appeals for the Second Circuit in *Lehman* v. *Commissioner*, 109 F. (2d) 99 (cert. den. 310 U. S. 637),

and of the Circuit Court of Appeals for the Ninth Circuit in *Commissioner* v. *Warner* (May 2, 1942).

(2) The decision of the Circuit Court of Appeals is probably in conflict with the decision of the Supreme Court in *Wilmington Trust Co., Executor of Alice du Pont Ortiz,* v. *Helvering,* — U. S. — (April 27, 1942), and other decisions of the Supreme Court therein cited.

Wherefore, it is respectfully submitted that the petition should be granted.

JAMES S. Y. IVINS,
Attorney for Petitioners.

June, 1942.

BRIEF[1]

Summary of Argument.

I.

Mrs. Boyd gave her life interest to petitioner only on condition that petitioner would forthwith place it in a trust, the terms of which had been dictated by Mrs. Boyd. Accordingly, as long as the source of income is Mrs. Boyd's life interest, Mrs. Boyd is the real grantor, and petitioner was merely her agent in setting up the trust. The decision below conflicts with

Buhl v. *Kavanaugh*, 118 F. (2d) 315 (C. C. A. 6);
Lehman v. *Commissioner*, 109 F. (2d) 99 (C. C. A. 2);
Commissioner v. *Warner*, May 2, 1942 (C. C. A. 9);
Minnesota Tea Co. v. *Helvering*, 302 U. S. 609;
Helvering v. *Ala. Asphaltic Limestone Co.*, — U. S. — (Feb. 2, 1942).

II.

The meaning of a trust instrument should be determined from the intent of the signer as demonstrated by the evidence—including all the provisions of the trust instrument and other competent evidence. The trial tribunal, in making its findings, in effect found the intent of the trust instrument. There was substantial evidence to sustain this finding. The court below erred in upsetting the finding of the Board of Tax Appeals. Its decision conflicts with *Wilmington Trust Co., Exr. of Ortiz,* v. *Helvering,* — U. S. — (April 27, 1942).

III.

If the court below had compared the phraseology of the trust instrument with that of the statute, it would have

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[1] For simplicity a single case is discussed, as in the statement, p. 5 above.

seen that the *accumulated income* could not have been distributed to petitioner, that no part of the *corpus* from which the accumulated income was derived could have been distributed to petitioner, and accordingly that no part of the accumulated income was taxable to petitioner.

IV.

The court below recognized that the trust was not a device for tax evasion. Accordingly the principle of *Helvering* v. *Clifford* [2] is not applicable.

ARGUMENT.

I.

Mrs. Boyd, Not Petitioner, Was the Real Grantor of the Trust So Far As Income Received During Her Life Is Concerned.

Mrs. Boyd had a life interest in 500 shares of Journal stock (R. 8, 50, 51). She desired to make provision for the financial welfare of petitioner (her daughter) and petitioner's children (R. 9, 43). She considered making a trust of her life interest in some of the Journal stock for her daughter and grandchildren and desired petitioner to make a similar trust of her remainder interest (R. 43, 44). On advice of counsel the procedure was simplified. Mrs. Boyd gave her life interest in 166 shares of Journal stock to petitioner *on condition* that petitioner would forthwith execute a deed of trust which had been prepared in accordance with Mrs. Boyd's ideas by Mrs. Boyd's counsel. By the trust instrument petitioner then conveyed the whole interest (Mrs. Boyd's life interest and petitioner's remainder) in the 166 shares to the trustee (R. 9, 44, 45).

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[2] 309 U. S. 331.

Mrs. Boyd is still alive. She testified in this proceeding (R. 41). Accordingly the income of the trust for the taxable years 1934-1936 was derived from Mrs. Boyd's contribution to the trust corpus. Mrs. Boyd would have received that income if she had not given her life interest to petitioner for the purpose of creating the trust. If she had created a separate trust of her life interest, she certainly would have been the grantor thereof, even if petitioner had simultaneously created a trust of the remainder.

> "A given result at the end of a straight path is not made a different result because reached by following a devious path."[3]

Mrs. Boyd was the real grantor of the trust so far as income during her life is concerned. Petitioner was merely her mother's agent in creating the trust as to her mother's life interest. If she had refused to execute the trust instrument, Mrs. Boyd could have compelled specific performance of her agreement or could have recaptured the life interest.

If petitioner should now seek to revoke the trust, Mrs. Boyd could undoubtedly restrain her.

Not being the real grantor petitioner was not liable for tax on the accumulated trust income, under Section 166 or 167. As to the distributed income, petitioner received that *as beneficiary* and reported it with her other income under Section 162(b) of the Revenue Acts.[4]

Petitioner raised this point before the Board of Tax Appeals, and before the Circuit Court of Appeals. The Board of Tax Appeals made the findings of fact requested by the petitioner in connection with this contention, but found it unnecessary to pass upon the issue, since it was deciding

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[3] *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, 613.

[4] Section 162 is quoted on p. 4 above.

in favor of petitioner on the broader ground that the trust did not come within Section 166 or 167 of the Revenue Acts.

The Circuit Court of Appeals gave scant consideration to this issue, dismissing it with the words:

> "Argument is made on behalf of the taxpayers that their mother, who thought up and arranged for the plan of the trust settlement, and not themselves, was the real grantor. We do not believe this to be true in fact or law.[5] The mother gave to the daughters, her agents, her life interest which was subject to being divested if the mother chose to sell these shares [6] or any other asset of the decedent's estate which was in her hands. But she did not do so. Instead she, in effect, offered to give to the daughters her interest in certain of the shares if they, in turn, agreed to dispose of the shares in a certain way. This they did. It is no less their act because they and their children benefited thereby. The mother was free to grant or not to grant; they were free to accept her offer or not to do so. We hold the transaction to be just what it was on its face, a deed in trust by the daughters to the trustee."

The reasoning of the Circuit Court of Appeals is directly in conflict with that of the Circuit Court of Appeals for the Sixth Circuit in *Buhl* v. *Kavanaugh*, 118 F. (2d) 315 (1941). There A had created a trust for B. He had the right to terminate it and let B get the corpus. He had no power to recapture the corpus himself. He offered to terminate on condition that B would forthwith create a new trust pre-

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[5] The Board, not the court, should have judged this fact—see discussion below of *Wilmington Trust Co.* (*Ortiz Est.*) v. *Helvering*, p. 17.

[6] The court seems to have thought that Mrs. Boyd would have been divested of her life interest by selling any of the Journal stock, in the sense that her interest would have passed to her daughters. On the contrary she had specific authority to sell the fee of any asset. It was the daughters' remainder interest that would have been divested if the mother had sold an asset. If Mrs. Boyd had remarried she would have lost a life interest in ⅔ but would have gained a fee in the other ⅓. See Mr. Boyd's will and decree thereon, R. 50, 52. Mrs. Boyd never remarried.

pared according to A's wishes. B agreed and it was so consummated. *Held* that A and not B was the grantor. A did not even own the property at the time of the transaction, as did Mrs. Boyd in our case. Our case is accordingly stronger for looking behind the form to the substance of the transaction than the Sixth Circuit case. The conflict is clear.

In *Minnesota Tea Co.* v. *Helvering*, 302 U. S. 609, the corporation claimed to have distributed moneys to its stockholders. They had agreed to pay certain debts of the corporation. This Court held that, to the extent that the debts were paid by the stockholders, there had been no distribution of assets to them but a discharge of the corporate debts. The reasoning is obviously irreconcilable with that of the Circuit Court of Appeals in the case at bar. The separate steps were integrated parts of a single scheme as in *Helvering* v. *Alabama Asphaltic Limestone Co.*, — U. S. — (Feb. 2, 1942). In that case this Court upheld the taxpayer against the claim of the government that the form of the several steps should control over the substance of the whole plan.

In *Lehman* v. *Commissioner*, 109 F. (2d) 99 (cert. den. 310 U. S. 637), two brothers made similar trusts for each other's benefit. The Second Circuit Court of Appeals looked through the form to the substance of the transaction and quoted from Scott on Trusts (§ 156.3):

> "A person who furnishes consideration for the creation of a trust is the settlor, even though in form the trust is created by another."

This reasoning is directly in conflict with that of the Third Circuit Court of Appeals in our case.

Similarly the decision in the present case conflicts with that of the Ninth Circuit Court of Appeals in *Commissioner*

v. *Warner*, — F. (2d) — (May 2, 1942). That was a case similar to the *Lehman* case. The court said:

> "Having thus furnished the consideration for the transfer of Albert's property to the trustees of trust B, Jack obviously was the donor of that property."

II.

The Court Below Usurped the Fact Finding Function of the Board of Tax Appeals.

The reasoning of the Circuit Court of Appeals, on the issue as to the applicability of Sections 166 and 167 of the Revenue Acts, is that the trustee had discretion to turn over corpus to the petitioner whenever needed for her "benefit" and that this word is so broad in meaning that—

> "The trustee certainly does have, under section 10 of the trust instrument * * * discretion almost without limit, to distribute the accumulations to the grantors." (R. 57.)

The court ignored the fact that the word "benefit" was used in conjunction with, and in the midst of other words, and that the rule of *noscitur a sociis* would naturally apply. What the trust instrument says is—

> "for the support, maintenance, benefit and/or education."

We take it to be well settled that:

> "If a trust is created by a transaction inter vivos and is evidenced by a written instrument, the terms of the trust are determined by the provisions of the instrument as interpreted in the light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible

because of the Statute of Frauds, the parol evidence rule, or some other rule of law.''[7]

Also:

''The phrase 'terms of the trust' means the manifestation of the intention of the settlor with respect to the trust expressed in a manner which admits of its proof in judicial proceedings.''[8]

This is not a litigation between parties to a written instrument, so of course the parol evidence rule has no application.

The essential question is the meaning of the word ''benefit'' in Section 10 of the trust indenture. And the meaning of that word, like the meaning of any provision of the instrument, or the meaning of the whole instrument is something to be determined in the light of the *intention of the settlor.*

The intention of the settlor is essentially a question of fact.

The Board of Tax Appeals made a finding of fact that:

''At no time from the creation of the trusts to the end of the year 1936 has the income of the petitioners, by distributions of income from the trusts and from other sources, been insufficient to properly provide for her support, maintenance, benefit and/or education, or for that of her dependents.''

Implicit in this finding is an interpretation of the word ''benefit'' for the Board must have had a meaning for it in mind in order to make the finding. So the Board's finding reflects its conclusion as to the settlor's intention.

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[7] Restatement of the Law. Trusts, Vol. 1, p. 404.

[8] *Ibid.* Vol. 2, p. 984.

The Circuit Court of Appeals not only, in effect, overruled a finding of fact of the Board but it ignored the well settled rule that an instrument must be construed in the light of its entire content.

Here we have a *spendthrift trust,* created, if not *by* at least *at the behest* of Mrs. Boyd, who wanted to protect her daughter from possible want in the future.

Sections 9(a) and 9(b) of the trust indenture (R. 11, R. 24) specifically prohibit anticipation. *What good would such provisions do if the entire corpus could be handed to the petitioner at any time, as the Circuit Court of Appeals would have it?*

Settlor, by signing an instrument prepared by her mother's counsel in the light of her mother's instructions, must have adopted the construction intended by her mother. The mother's whole purpose was to prevent what the court below says was permissible under the deed of trust.

Mr. Evans was responsible for the relief clause—Section 10. He was trust officer of the trustee corporation. He put that clause into numerous trusts—and knew how the trustees understood it (R. 48-49). His idea of the meaning of the words used was undoubtedly Mrs. Boyd's idea—and petitioner's. So there was substantial evidence for the Board's finding which the Circuit Court of Appeals in effect overrules.

This puts the Circuit Court of Appeals decision in direct conflict with the decision of this Court in *Wilmington Trust Company, Executor of Ortiz* v. *Helvering,* — U. S. — (April 27, 1942).

The Board's decision, in our case, of necessity, involved a determination that the settlor had not reserved an unlimited right to revoke the trust and vest in herself the

property that her mother had given on the express condition that it be subjected to an irrevocable spendthrift trust. That question, like the question in the *Ortiz Estate* case, was one of fact, for the Board. The fact, in our case, being the intent of the settlor, the Board's finding that "Each trust is irrevocable" (R. 10) here is parallel with the Board's finding that the sales in the *Ortiz Estate* case were not short sales.

The Circuit Court of Appeals committed the same error here that it did in the *Ortiz* case.

III.

The Court Below Erred in Failing to Check the Terms of the Trust Agreement With the Phraseology of the Revenue Act.

The trust income is divided into parts (a) for "Journal stock accumulation" under Section 1 of the trust agreement (R. 17-19), and (b) for distribution to beneficiaries. The petitioner not yet having set aside any shares for her children, under Section 4 (R. 19) the entire *distributive* income has gone to petitioner and has been reported as income by her. The dispute is entirely as to the income accumulated under Section 1.

In every year one-third of the total income exceeded $20,000 (R. 46, 47), so the provision of Section 1a (R. 18) limiting the accumulation to one-third of the income was always operative. So the income was divided into two parts: A—one-third—accumulated, and B—two-thirds—paid to petitioner.

Was any part of the A income within the provisions of Section 166 or 167 even if the Circuit Court has correctly construed the word "benefit"?

Let us parallel the provisions of the trust agreement with those of the statute, emphasizing the limiting phraseology:

If * * * the income of any beneficiary * * * should be insufficient to properly provide for the support * * * of such beneficiary * * * Trustee is authorized * * * to pay over unto * * * such beneficiary so much of the principal of any part or the whole of the trust fund **from which such beneficiary may then be receiving the income or the benefit thereof,** as may from time to time be required to make up such insufficiency of income.

Sec. 166.

"Where * * * power to revest in the grantor **title to any part of the corpus** of the trust is vested * * * then **the income of such part** of the trust shall be included in computing the net income of the grantor.

Sec. 167.

"(a) Where **any part** of the income of a trust—

(1) is or * * * may be held or accumulated for future distribution to the grantor; or

(2) may * * * be distributed to the grantor * * * then **such part** of the income of the trust shall be included in computing the net income of the grantor.

Even if the trustee decided that petitioner's income from all sources in any year was insufficient for her "benefit", it would not be permitted to give her any of the A income. Its power would be to give her part of the corpus then producing the B income—i.e., *the trust fund from which such beneficiary may then be receiving the income.*

Since the trustee could not give petitioner any part of the A income, which had to be accumulated until the fund amounted to $1,000,000 or the Journal stock was all sold—neither of which events has occurred—the provisions of Section 167 could not apply (the accumulation all being for the benefit of unascertained persons with contingent interests).[9]

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[9] See section 161(a), p. — *supra.*

Also, since the trustee could not give petitioner any part of the corpus which was producing the A income—being allowed to give her only corpus from which she was then receiving the income—Section 166 has no application. For it only provides for taxing to the grantor the income of *that part of the corpus which could be handed to the grantor.*

The Circuit Court of Appeals certainly erred in not comparing the terms of the trust agreement with those of the statute.

IV.

The case does not fall under Helvering v. Clifford.[10]

The court below recognized that the transaction was for a legitimate object and not for tax evasion (R. 58, 59).

The petition should be granted.

Respectfully submitted,

James S. Y. Ivins,
Attorney for Petitioners.

June, 1942.

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[10] 309 U. S. 331.

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 107

MARY BOYD EVANS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 108

KATHARINE BOYD MOREHEAD, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW [1]

The majority and minority opinions in the Board of Tax Appeals (R. 13–16) are reported in 42

[1] These cases involve the same questions and were consolidated for hearing and opinion in the Board of Tax Appeals (R. 3, 7, 35), and in the court below (R. 53, 54).

B. T. A. 851. The opinion of the Circuit Court of Appeals (R. 54–59) is reported in 126 F. (2d) 270.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered March 2, 1942 (R. 59, 60). The petition for writs of certiorari was filed May 29, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Each taxpayer executed a trust agreement under which the trustee was directed to accumulate annually and add to corpus a portion of the income not in excess of one-third until the accumulations aggregated $1,000,000, and to pay over to the trustor during her lifetime so much of the income of the trust fund, or of her share if divided into shares pursuant to the terms of the agreement, as should not be subject to accumulation. The grantor reserved the right to direct the trustee to set aside certain portions of the trust fund as shares for the benefit of her issue and upon her death the income and eventually the principal of the shares was to go to such issue and their descendants. The grantor authorized the trustee, a trust company, to pay over principal to the grantor if, during continuance of the trust, her income should be insufficient for the support and "benefit" of herself and her dependents. Neither taxpayer has

ever directed a division of the trust fund into shares and at no time has the income of either of them been insufficient for the support and benefit of herself and dependents. Were the taxpayers accountable under Section 22 (a), 166 and 167 of the Revenue Acts of 1934 and 1936 for income accumulated in the respective trusts?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set out in the Appendix, *infra,* pp. 15–24.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 8–13) may be summarized as follows:

The taxpayers are the daughters of Lloyd T. Boyd and his wife, Susan A. Boyd. Lloyd T. Boyd died testate in 1914 and his will was admitted to probate in Wisconsin in 1915. Under the decedent's will and the decree of the County Court for Milwaukee County, Wisconsin, dated December 22, 1915, all of his personal and real property was to be distributed to Susan Boyd for life, or until she remarried, with full right and power to use, enjoy, sell, or dispose of the same during such period. Also, under that will and decree, in the event of Susan Boyd's remarriage, two-thirds of decedent's estate, and upon her death, all of decedent's estate then remaining undisposed of and in her hands, was to be distributed, in equal shares, to the taxpayers. Up to the time of the hearing on these

proceedings Susan Boyd was living and had not remarried and the property of decedent was distributed to her in accordance with the provisions of decedent's will and the decree of the County Court (R. 8–9).

The principal asset embraced in the decedent's estate consisted of 500 shares of stock of the Journal Company. For a period of years up to November 1931, the 500 shares stood in the individual name of Susan Boyd on the records of the Journal Company (R. 9).

Over a period of about three years prior to 1931, Susan Boyd considered the advisability of placing in trust, during her lifetime, a portion of the 500 shares of Journal Company stock for the protection and benefit of each of her two daughters and their children. In the fall of 1931, after several conferences with members of the family and her attorneys, Susan Boyd proposed to transfer her life interest in 166 shares of Journal Company stock to each of taxpayers, with the understanding that they would each immediately thereafter execute the trust instrument which she had had drawn for each of them as grantor, respectively, and each of the taxpayers agreed to such proposal (R. 9).

On November 2, 1931, Susan Boyd, as the first party, and taxpayers, as the second parties, executed an agreement whereby the former transferred all her right, title, and interest in 166 shares of Journal Company stock to each of the

latter two, free from any right, claim, or interest therein of Susan Boyd. By the same agreement taxpayers each agreed that such transfer was in full satisfaction and discharge of any and all obligation of Susan Boyd to divide any portion of her deceased husband's estate with them, except that they retained their vested remainder interest in the remaining 168 shares of Journal Company stock as to which Susan Boyd retained her life interest (R. 9–10).

Pursuant to the understanding with their mother, and under date of November 12, 1931, the taxpayers, each as trustor, executed a separate trust agreement whereby they each, as owner, transferred 166 shares of Journal Company stock to the Wilmington Trust Company, a Delaware corporation, as trustee. Those two trust instruments were drafted pursuant to Susan Boyd's ideas, which were, *inter alia:* (1) To provide a sufficient income for the maintenance of each of her daughters for life and thereafter to their children; (2) to provide for the accumulation and investment of a portion of the trust income to build up the corpus so as to guard against the hazard of the Journal Company stock becoming worthless at some future date; and (3) to provide her daughters with the right, during their lifetime, to direct the trustee to divide the trust fund into shares for the benefit of their respective issue. The two trust instruments contain similar provisions (R. 10).

Each trust purports to be irrevocable.[2] The corporate trustee is given broad powers to hold, manage, sell, invest, and reinvest the trust corpus and any accumulated income under the direction, or with the consent, of a named "advisor" other than the trustor, except that it may dispose of the trusteed Journal Company stock only upon the written direction or consent of Susan Boyd during her lifetime. The "advisor" and a majority of the adult beneficiaries of the trust may remove the trustee and appoint as a successor a bank or trust company having a capital of at least $1,000,000 (R. 10).

The corporate trustee, so long as it holds any shares of Journal Company stock, is directed to accumulate annually and add to the corpus a certain portion of the income of the trust fund (including the income from any shares intc which the trust fund may be divided for the benefit of the trustor's children) namely, the portion by which the net income of the trust fund shall exceed $20,000, until the fair market value of such accumulations amount, in the aggregate, to $1,000,000; but not more than one-third of such net income in any one year shall be so accumulated (R. 11).

The corporate trustee is directed to pay over to the trustor during her life so much of the net income of the trust fund, or of her share in such

[2] The court below sustained our contention that the trusts were revocable in fact and in law even though they contained no express provision for revocation.

trust fund if the trust fund has been divided into shares, as shall not be subject to accumulation (R. 11).

The trustor, during her lifetime, is given the right to direct the trustee to set aside certain portions of the trust fund as "shares" for the benefit of her issue. Upon the trustor's death the income, and eventually the trust fund or the "shares" thereof, go to the trustor's issue and their descendants (R. 11).

The trust instrument further provides (R. 11–12):

> 9. (a) It is the intent hereof that the income of the trust fund shall be used only for the personal benefit of the beneficiaries herein named or described and their dependents, and said income shall not be susceptible of anticipation, assignment, attachment, garnishment, seizure or other diversion from said purposes. No part thereof shall be paid to any assignee of any beneficiary.
>
> * * * * *
>
> 10. If, during the continuance of this trust, the income currently payable hereunder to or for the benefit of any beneficiary, together with his or her income from other sources, should be insufficient to properly provide for the support, maintenance, benefit and/or education of such beneficiary and his or her dependents, Trustee is authorized and empowered, in its sole discretion, to pay over unto or for the benefit of such benefici-

> ary so much of the principal of any part or the whole of the trust fund from which such beneficiary may then be receiving the income or the benefit thereof, as may from time to time be required to make up such insufficiency of income. The receipt of any beneficiary for or evidence of the application to the benefit of any beneficiary of any payment made in conformity with the foregoing provision shall fully discharge Trustee from any further liability in connection therewith.

Since the creation of the trusts the trustee has made no distributions to either of the taxpayers under the provisions of paragraph 10 (R. 12).

Neither of the taxpayers has ever directed a division of the trust fund into "shares" and up to December 31, 1936, all of the income of each trust that was not subject to accumulation has been distributable to them, respectively (R. 12).

During the taxable years each of the taxpayers was the owner of separate property and had income other than that received from the trusts. At no time from the creation of the trusts to the end of the year 1936 has the income of either of the taxpayers, by distributions of income from the trusts and from other sources, been insufficient to provide properly for her support, maintenance, benefit, and/or education, or for that of her dependents (R. 12).

On December 30, 1936, the trustee sold for each trust 33 shares of Journal Company stock for

$3,500 per share. Such shares were a part of the 500 shares of Journal Company stock embraced in the estate of Lloyd T. Boyd at the appraised value of $80,000, or $160 per share (R. 13).

In determining the deficiencies, the Commissioner determined that the taxpayers, as grantors, are taxable upon the entire income of their respective trusts, under Sections 166 and 167 of the Revenue Acts of 1934 and/or 1936. To the distributable and distributed trust income reported by each of taxpayers in their respective individual tax returns, the Commissioner added the following amounts, representing the accumulated trust income for each taxable year, which were reported on the fiduciary returns as being taxable to the trustee (R. 13):

	Amount	Year
Katharine Morehead	$60,441.10	1936
Mary Evans	19,822.98	1934
	14,154.53	1935
	60,144.18	1936

Upon review the Board of Tax Appeals held that the taxpayers were not accountable for the accumulated trust income but the court below reversed the decision of the Board.

ARGUMENT

The court below held, correctly, we submit, that the taxpayers are accountable under Sections 166 and 167 of the Revenue Acts of 1934 and 1936

(Appendix, *infra*) for income accumulated in the respective trusts. Section 166 provides that where at any time the power to revest in the grantor title to any part of the corpus of a trust is vested in the grantor or in any person not having a substantial adverse interest, then the income of such part of the trust shall be included in computing the net income of the grantor. Section 167 provides that where any part of the income of a trust is, or in the discretion of the grantor or of any person not having a substantial adverse interest may be, held or accumulated for future distribution to the grantor; or may, in the discretion of the grantor or of any person not having a substantial adverse interest, be distributed to the grantor; then such part of the income of the trust shall be included in computing the net income of the grantor. In the instant cases, the trustee, a trust company, was empowered to pay over to the grantor from time to time any part or all of the principal, including accumulated income, in case the grantor's income from all sources should be insufficient to provide properly for the "support, maintenance, benefit, and/or education" of herself and dependents. The court below took the view that this gave the trustee, which had no substantial adverse interest, discretion almost without limit to distribute the accumulations to the grantors and therefore they are taxable under Sections 166 and 167 even though no such distributions were in fact made. The decision here

is in harmony with the recent decision of the Sixth Circuit in *Wenger* v. *Commissioner,* decided April 7, 1942, not yet officially reported, but may be found in 1942 C. C. H., Vol. 4, par. 9438, and does not conflict with any case decided by this Court or a Circuit Court of Appeals.

In support of their application for writs of certiorari, the taxpayers urge (Br. 11–15) that their mother was the real grantor of the trusts as far as income received during her life is concerned. This contention was rejected by the court below and we submit that it is without merit. The mother had only a defeasible life interest in the Journal stock and she could not effectively have created the instant trusts without the consent of her daughters, who took vested remainders under their father's will (R. 43). The mother assigned her interest in part of the stock to the daughters who gave at least some consideration therefor; they were the absolute owners of the property when they executed the respective trust agreements as grantors. The record affords no adequate basis for the contention that the taxpayers were merely conduits employed by the mother in setting up the trusts. It is true that the trusts were established in accordance with an understanding with the mother but we submit that this does not compel the conclusion that she was the real grantor. The asserted conflicts are predicated upon differing applications of the principle of looking through form

to substance, and the facts in those cases differ materially from the facts herein. Thus, the instant cases are distinguishable from *Buhl* v. *Kavanaugh,* 118 F. (2d) 315 (C. C. A. 6th), where the court held that the taxpayer's father had such complete domination and control over the property transferred in trust as to justify the conclusion that he was the grantor even though the trust instrument was in fact executed by his daughter. The cases of *Lehman* v. *Commissioner,* 109 F. (2d) 99 (C. C. A. 2d), certiorari denied, 310 U. S. 637, and *Commissioner* v. *Warner* (C. C. A. 9th), decided May 2, 1942, not yet officially reported, but may be found in C. C. H. Inheritance, Estate and Gift Tax Service, par. 10,177, also cited by taxpayers (Br. 10, 14–15), relate to reciprocal trusts and do not conflict with the decision below.

It is contended (Br. 15–18) that the court below usurped the fact-finding function of the Board of Tax Appeals in holding that the trustee could have distributed the trust corpus to the grantors whenever they would benefit from such action. The Board of Tax Appeals did not find as a fact that the word "benefit" was intended to have other than its commonly understood meaning. The taxpayers' contention that the Circuit Court of Appeals *in effect* overruled the Board's finding is predicated upon what they term an *implicit* find-

ing by the Board. In so interpreting the trust agreement, the court correctly decided a question of law and there is no merit to the taxpayers' argument that it exceeded its authority by overturning a finding of fact made by the Board upon the basis of substantial evidence. *Wilmington Trust Co.* v. *Helvering*, No. 775, 1941 Term, cited by taxpayers (Br. 10, 17–18), presents a situation which is entirely different from the one at bar.

The taxpayers also urge (Br. 18–20) that under no proper construction of the trust agreement could the trustee have distributed to the grantors any of the accumulated income or the principal from which it was earned. But that argument is at variance with the plain provisions of the trust agreement, heretofore alluded to, authorizing the trustee to pay over principal to the grantor for her support or benefit. Since accumulated income was added to principal, it would be included in the funds subject to distribution to the grantor.

In the circumstances, we submit that the instant application should be denied, but if it should be granted, then we will also contend, as we did in the court below, that the grantors are taxable under Section 22 (a) of the Revenue Acts of 1934 and 1936 (Appendix, *infra*). *Helvering* v. *Clifford*, 309 U. S. 331; *Hormel* v. *Helvering*, 312 U. S. 552; *Helvering* v. *Richter*, 312 U. S. 561; *Helvering* v. *Fuller*, 310 U. S. 69, 76; *Helvering* v. *Horst*, 311 U. S. 112; *Harrison* v. *Schaffner*, 312 U. S. 579;

Commissioner v. *Buck,* 120 F. (2d) 775 (C. C. A. 2d); *Cox* v. *Commissioner,* 110 F. (2d) 934 (C. C. A. 10th), certiorari denied, 311 U. S. 667.

CONCLUSION

The decision below is correct; there is no conflict; the petition should be denied.

Respectfully submitted.

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JUNE 1942.

APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

SEC. 166. REVOCABLE TRUSTS.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor.

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23 (o), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question.

Sections 22 (a), 166 and 167 of the Revenue Act of 1936, c. 690, 49 Stat. 1648, contain the same provisions as the above provisions of the 1934 Act.

Treasury Regulations 86, promulgated under the Revenue Act of 1934:

ART. 22 (a)–1. *What included in gross income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22 (b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profits gained through a sale or conversion of capital assets. * * *

* * * * *

ART. 166–1 [as amended by T. D. 4629, XV–1 Cum. Bull., 140, 141 (1936), and T. D. 4759, 1937–2 Cum. Bull., 117, 118]. *Trusts, with respect to the corpus of which, the grantor is regarded as remaining in substance the owner.*—(*a*) If the grantor of a trust is regarded, within the meaning of the Act, as remaining in substance the owner of the corpus thereof, the income therefrom is not taxable in accordance with the provisions of sections 161, 162, and 163, but remains attributable and taxable to the grantor. This article deals with the taxation of such income. As used in this article, the term "corpus" means any part or the whole of the property, real or personal, constituting the subject matter of the trust.

(*b*) Section 166 defines with particularity instances in which the grantor is regarded as in substance the owner of the corpus by reason of the fact that he has retained power to revest the corpus in himself. For the purposes of this article the grantor is deemed to have retained such power if he, or any person not having a substantial interest in the corpus, or the income therefrom adverse to the grantor, or both, may

cause the title to the corpus to revest in the grantor. If the title to the corpus will revest in the grantor upon the exercise of such power, the income of the trust is attributed and taxable to the grantor regardless of—

(1) whether such power or ability to retake the trust corpus to the grantor's own use is effected by means of a power to revoke, to terminate, to alter or amend or to appoint;

(2) whether the exercise of such power is conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event;

(3) the time at which the title to the corpus will revert in the grantor in possession and enjoyment, whether such time is within the taxable year or not, or whether such time be fixed, determinable, or certain to come;

(4) whether the power to revest in the grantor title to the corpus is in the grantor, or in any person not having a substantial interest in the corpus or income therefrom adverse to the grantor, or in both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(5) when the trust was created.

But the provisions of section 166 are not to be regarded as excluding from taxation to the grantor the income of other trusts not specified therein, in which the grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to part permanently and definitively

with the substantial incidents of ownership in the corpus.

In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term; the fact that the corpus is or may be administered in the interest of the grantor; the fact that the anticipated income is being appropriated in advance for the customary expenditures of the grantor or those which he would ordinarily and naturally make; and any other circumstances bearing on the impermanence and indefiniteness with which the grantor has parted with the substantial incidents of ownership in the corpus.

Thus the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make those expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the crea-

tion of the trust, an irrevocable disposition or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for the specified period. On the other hand, if the grantor, incident to a definitive and permanent disposition of certain of his property, creates the trust in order to conserve the property not for himself but for the donees, who will ultimately enjoy it, the provisions of sections 161, 162, and 163 are applicable.

(*c*) For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if he has placed it in trust for his son, John.

(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such an extension the title is once more to revest in the grantor in possession and enjoyment; or

(B) for the term of a year and a day, then to be distributed to whomsoever the wife of the grantor shall by deed appoint (the wife not having a substantial adverse interest in the disposition of the corpus or the income therefrom); or

(C) for the term of the grantor's life, then to be distributed to John, the grantor reserving, however, the right to alter, amend, or revoke any provision of the trust instrument, upon notice of a year and a day.

In these typical cases the grantor is regarded as having retained the substantial incidents of ownership with respect to the income-producing property since the corpus will or may once more revest in himself in (A) upon the expiration of the trust period

if the grantor does not exercise his option to extend the trust, in (B) upon the designation of the grantor as distributee, by a person not substantially and adversely interested, and in (C) upon the revocation of the trust instrument or an alteration or amendment thereof, resulting in the designation of the grantor as distributee.

(*d*) If the grantor is regarded as remaining in substance the owner of the corpus the gross income of such corpus shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to the corpus as he would have been entitled to had the trust not been created.

If the grantor strips himself of the substantial incidents or attributes of ownership in the corpus retained by him so that he ceases to be regarded as in substance the owner of the corpus, the income thereof realized after the effective date of such divesting is not taxable to the grantor but is taxable as provided in sections 161, 162, and 163.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the corpus or the income therefrom. If the power to revest title in the grantor is vested in him in conjunction with such person, or is vested solely in such person, there is to be excluded in computing the net income of the grantor only the income of such part.

ART. 167-1 [as amended by T. D. 4759, *supra*, and T. D. 4860, 1938-2 Cum. Bull. 184]. *Trusts in the income of which the grantor retains an interest*—(*a*) *Scope.*—Section 167 prescribes that the income, or any part of the income, of certain trusts

shall be taxed to the grantor, not because the grantor has retained a certain interest in the *corpus* of the trust (as in section 166), but because of his retention of a certain interest in the *income* of the trust. This article deals with the taxation of such income. The term "income," as used in this article, means any part or the whole of the income of the trust.

(*b*) *Tests of taxability to the grantor.*—The test prescribed by the Act as to the sufficiency of the grantor's retained interest in the trust income, resulting in the taxation of such income to the grantor, is whether he has failed to divest himself, both permanently and definitively, of every right which might, by any possibility, enable him to have such income, at some time, distributed to him, either actually or constructively. Such a distribution to the grantor occurs within the meaning of section 167 if the income is paid to him or to another in obedience to his direction or if the income is applied in payment of premiums upon policies of insurance on the grantor's life.

For the purposes of this article, the sufficiency of the grantor's retained interest in the income is not affected by the fact that the grantor has provided that the right to so effect or direct the distribution of income is, or may at some future time be, vested in any person (either alone or in conjunction with the grantor) not having a substantial interest in the income adverse to the grantor.

If the grantor has retained any such interest in the income, such income is taxable to the grantor regardless of—

(1) whether it may be distributed currently or accumulated for future distribution;

(2) whether such distribution, either current or subject to accumulation, is fixed by the trust instrument or is dependent on an exercise of discretion;

(3) whether, if such distribution is in any way effected by or dependent on an exercise of discretion, the person exercising the discretion is the grantor or a person not having a substantal interest in the income adverse to the grantor, or both. A bare legal interest, such as that of a trustee, is never substantial and never adverse;

(4) the time or times of such distribution, whether within or without the taxable period, whether conditioned on the precedent giving of notice, or on the elapsing of an interval of time, or on the happening of a specified event, or otherwise;

(5) when the trust was created.

Thus the inclusion of any trust within the scope of section 167 is based on the fact that the grantor has retained an interest in the income therefrom by which he is, or may be enabled at some time, to receive its benefits. But the provisions of section 167 are not to be regarded as excluding from taxation to the grantor the income of other trusts, not specified therein, in which the grantor is, for the purposes of the Act similarly regarded as remaining in substance the owner of the trust income. If, for example, trust income is applied in satisfaction of the grantor's legal obligation whether to pay a debt, to support dependents, to pay alimony, to furnish maintenance and support, or otherwise, such income is in all cases taxable to the grantor.

If the grantor strips himself permanently and definitively of every such interest retained by him, the income of the trust

realized after such divesting takes effect is not taxable to the grantor but is taxable as provided in sections 161 and 162.

A person may have an interest that is both substantial and adverse to the grantor in the disposition of only part of the income. There is to be excluded in computing the net income of the grantor only that part of the trust income in the disposition of which such person has a substantial interest adverse to the grantor.

(*c*) *Income and deductions.*—If, as to any of the income, the test of taxability to the grantor is satisfied, such income shall be included in the gross income of the grantor, and he shall be allowed those deductions with respect to such income as he would have been entitled had such income been distributable currently to him.

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

Article 22 (a)–1 contains the same provisions as the corresponding provisions of Treasury Regulations 86, above quoted.

The provisions of Article 166–1, as amended by Treasury Decision 4759, *supra,* are the same as the corresponding provisions of Treasury Regulations 86, above quoted.

The provisions of Article 167–1, as amended by Treasury Decision 4759, *supra,* and Treasury Decision 4860, *supra,* are the same as the corresponding provisions of Treasury Regulations 86, above set out.

U. S. GOVERNMENT PRINTING OFFICE: 1942

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 107.

Mary Boyd Evans, *Petitioner*,

v.

Guy T. Helvering, Commissioner of Internal Revenue.

No. 108.

Katharine Boyd Morehead, *Petitioner*,

v.

Guy T. Helvering, Commissioner of Internal Revenue.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

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Press of Byron S. Adams, Washington, D. C.

CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 107.

MARY BOYD EVANS, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

No. 108.

KATHARINE BOYD MOREHEAD, *Petitioner*,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONER[1].

Respondent's brief in opposition to the petition is hardly candid.

It begins by saying:

> "The facts as found by the Board of Tax Appeals (R. 8-13) may be summarized as follows:—"

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[1] As in our original brief, for simplicity we will speak in the singular as if only one case were here.

and continues with a summary of the Board's findings, until it comes to the most crucial one. The Board's finding (R. 10) was:

> "Each trust is irrevocable."

But respondent's brief says:

> "Each trust purports to be irrevocable"

and adds a footnote:

> "The court below sustained our contention that the trusts were revocable in fact and in law even though they contained no express provision for revocation."

Since a principal issue here is the right of the Circuit Court of Appeals to set aside findings of fact, we submit that the respondent's brief should not have used this language as part of a summary of the *Board's* findings.

Respondent's brief (p. 3) begins by recognizing that, as a fact, at no time was the income of petitioner insufficient for the support and benefit of petitioner. This fits exactly with the Board's finding (R. 12). In other words, the contingency which might render the trust in small part revocable, never occurred. Nevertheless respondent's brief attempts to justify a conclusion that the trust was at all times wholly revocable.

On pages 10-11, respondent's brief says the decision below is in harmony with the decision in *Wenger* v. *Commissioner* (127 F. (2d) 523). But it neglects to point out that in the *Wenger* case the Circuit Court of Appeals accepted the Board's findings and affirmed, while here the court below departed from the Board's findings and reversed. The Board, in its opinion in this case (R. 15) distinguished the *Wenger* case *on the facts*.

Respondent's brief (p. 11) says:

> "The mother had only a defeasible life interest in the Journal stock."

She had much more than that—if she did not remarry, her interest in *all* the stock continued throughout her life. If she had remarried, she would have taken a full fee ownership in one-third of the property which had not then been disposed of (R. 50-51). The power of disposition in Mrs. Boyd (see last paragraph on p. 50 of the record) was so broad that her ownership was obviously much broader than a defeasible life estate.

The respondent's brief (p. 11) in effect argues that since the daughter gave "at least some consideration" for the conveyance by the mother, other than the agreement to create the trust, the daughter was not bound by the agreement to create the trust. The consideration surrendered by the daughter was a reversion in some minor assets, worth \$1,980.66 at the outside. The life estate in the Journal stock, which she acquired subject to agreement to create the trust, was worth \$175,610.40.[1]

If A were creating a trust and wished to avoid taxation under section 167, so he "sold" his assets to B (a beneficiary of the proposed trust) for a nominal consideration, and B executed the trust indenture—respondent would be the last to admit that the nominal consideration would render A any the less the real grantor of the trust.

It is obvious that Mrs. Boyd was in a position to insist that the trust she had drafted be executed or else that she get her property back—she having given the property only on condition that the trust be created—so respondent's brief certainly is wrong in saying (p. 11):

> "The record affords no adequate basis for the contention that the taxpayers were merely conduits employed by the mother in setting up the trusts."

So far as the trusts covered Mrs. Boyd's interest in the property, that is exactly what they were.

And in any event whether they were or not is a question of fact which the Board, not the Circuit Court of Appeals, should decide.

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[1] For sources of these figures see Appendix, p. 7 hereof.

The effort in respondent's brief (p. 12) to distinguish *Buhl* v. *Kavanagh* (118 F. (2d) 315), is based upon evasion of the announced principle upon which that case was decided by quibbling with words.

In the *Buhl* case.	In our case.
the father had previously created a trust, but retained such control as to be regarded in law as still the owner.	the mother was the owner of the life estate.
He agreed to vest the corpus in the daughter	She agreed to vest the life estate in the daughter
by the process of terminating the trust	by the instrument of November 2, 1931
on condition that a new trust	on condition that a trust
prepared by him be executed by the daughter.	prepared by her be executed by the daughter.
The Circuit Court of Appeals held the father to be the grantor of the new trust.	The Circuit Court of Appeals held the mother *not* to be the grantor of the trust.

Respondent's brief (p. 12) disposes of the conflicts with *Lehman* v. *Commissioner*, 109 F. (2d) 99, and *Commissioner* v. *Warner*, 127 F. (2d) 913, by the mere *ipse dixit* that there is no conflict because those cases involved reciprocal trusts. If those cases were correctly decided (the Commissioner won in both) then *a fortiori* the court below erred in the case at bar.

In those cases	In this case
A, by giving B *equivalent consideration,* induced B to create a trust of property theretofore owned by B.	A, by giving B *the very subject of the trust,* induced B to create a trust of property theretofore owned by A.
A was held to be in effect the grantor of such trusts.	*A fortiori* A should be held the grantor of the trust.

Similarly respondent's brief (p. 13) disposes of the conflict with *Wilmington Trust Co.* v. *Helvering*, .. U. S. .. (No. 775, 1941 term) by merely saying that "it presents a situation which is entirely different from the one at bar".

Apparently respondent's counsel was afraid to analyze this decision as he was afraid to analyze the others we have covered above.

In that case	In this case
the Board of Tax Appeals found that certain sales although treated on taxpayer's books as short sales were in fact long transactions.	the Board of Tax Appeals found that a contingency had not occurred.
The Circuit Court of Appeals for the Third Circuit reversed on the ground that as a matter of law the transactions were not short sales.	The Circuit Court of Appeals for the Third Circuit reversed on the ground that as a matter of law the contingency was entirely at the taxpayer's will.
The Supreme Court reversed the Circuit Court of Appeals on authority of *Helvering* v. *F. & R. Lazarus & Co.*, 308 U. S. 252.	A writ of certiorari should be allowed on the same authority.

In the *Lazarus* case	In this case
"The Board *in substance* found that the instrument under which the taxpayer purported to convey legal ownership to the trustee bank was in reality given and accepted as no more than security for a loan; * * *.	The Board *in substance* found that the intention of the grantor of the trust was to provide for invasion of corpus of the trust in the event of a real need which had not occurred.
These findings are supported by evidence." [308 U. S. at 254]	The finding is supported by evidence. [See brief annexed to petition, pp. 16-17]

The Circuit Court of Appeals made its own interpretation of the effect of the documents executed.	The Circuit Court of Appeals put its own interpretation on words showing the intent of the trust instrument.
The Supreme Court restored the Board's conclusion.	A writ should be allowed.

Respondent's brief (p. 13) says that the argument on pages 18-20 of the brief annexed to the petition "is at variance with the plain provisions of the trust instrument". Since that argument involved quotation of the very words of the trust instrument, we submit that respondent should have at least indicated the nature of the alleged variance.

It is respectfully submitted that a writ of certiorari should be granted.

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September, 1942.

APPENDIX.

Sources of figures given on p. 3 above.

The estate of Lloyd T. Boyd consisted of 500 shares of Journal stock which was worth $80,000 in 1914,[1] by 1932 was earning $49,604 on each 166 shares,[2] and which sold in 1936 at $3500 a share.[3]

The balance of the estate of Lloyd T. Boyd consisted of assets valued in 1914 as follows:

One bond of Milwaukee Golf Club	$450.
Watch and stick pins	35.
1913 Cadillac automobile	700.
Household furniture	795.[4]

and some land which was sold by Mrs. Boyd for $4000 in 1927.[5]

The Golf Club bond might have appreciated to par by November 1931—though that was right in the depression and it is hardly likely—but let us put it down at .... $1,000.

The jewelry was certainly worth no more than . . $ 35.

The 1913 Cadillac was certainly worthless in 1931 but if Mrs. Boyd had sold it for $700 she might still have had the .... $ 700.

And the household furniture certainly did not increase over its 1914 value..................... $ 795.

So at most the value of the estate, outside of the Journal stock was $6,530 as against upwards of $1,500,000 for the stock. Mrs. Boyd was 70 years old in 1939.[6] She was, accordingly, 62 in 1931. Her life interest in the 166 shares of

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[1] Finding: R. 9.

[2] Testimony of E. Evans, R. 46.

[3] Testimony of E. Evans, R. 46.

[4] R. 51.

[5] Stip., R. 47. Testimony of E. Evans, R. 48.

[6] Testimony of K. Morehead, R. 50.

Journal stock put into each trust was \$175,610.40.[1] Each daughter surrendered her rights in her father's estate (other than in the 168 shares of Journal stock remaining in Mrs. Boyd's hand) which, on the same basis, were worth not more than \$1,980.66.[2] Hardly enough of a purchase price to eliminate the idea of donative intent on the mother's part!

And of course the creation of trusts of their remainders was consideration of a sort for the creation of trusts of her life estate. Like the promise of A to donate a certain amount to a college if others will agree to donate similar amounts. But that would not entitle A to an income tax deduction for charitable contributions of the amounts furnished by the others. Each would still be making his own gift. And Mrs. Boyd, on the one hand, and her daughters, on the other, were each creating a trust of her own interest in the stock, even if such creation was conditioned upon similar action by the other.

[1] Taking each block of 166 shares as worth \$500,000 (each trust actually collected between January 1, 1932, and December 31, 1938, over \$445,000—Testimony of E. Evans, R. 46-47) and applying the 4 per cent rule of the Treasury Regulations (see *Smith* v. *Shaugnessy*, 40 F. Supp. 19) and the 4 per cent table published by the Treasury in Regulations 80, Art. 13, table A, the value of the life estate of Mrs. Boyd in each block of 166 shares was \$20,000 x 8.78052 or \$175,610.40.

[2] \$6,350 ÷ 2 x .62383, see same table.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 107.

MARY BOYD EVANS, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE.

No. 108.

KATHARINE BOYD MOREHEAD, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIORARI.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

October Term, 1942.

No. 107.

Mary Boyd Evans, *Petitioner*,

v.

Commissioner of Internal Revenue.

No. 108.

Katharine Boyd Morehead, *Petitioner*,

v.

Commissioner of Internal Revenue.

On Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

PETITION FOR RECONSIDERATION OF ORDER DENYING PETITION FOR CERTIORARI.

The petitioners herein, by their undersigned counsel, respectfully show:

The petition for certiorari herein was filed on May 29, 1942 and numbered 1271 and 1272 for the 1941 October Term. The brief in support of the petition accompanied the petition. Respondent served his brief in opposition on

petitioners' counsel on June 23, 1942. Because it was recess time and the rules did not require immediate reply, petitioners' counsel delayed filing his reply brief until after a summer vacation. The reply brief was filed on September 12, 1942.

Petitioners' counsel fears that possibly the petition and respondent's brief had been assigned to a Justice for study before receipt of the reply brief, and that the reply brief was overlooked in the press of work at the beginning of the 1942 term, or that in that press of work the Court failed to notice that:

(1) There are *real* conflicts between the decision of the Circuit Court of Appeals and decisions of other Circuit Courts of Appeals and of this Court, which conflicts were shown in detail by parallel column presentation in petitioners' reply brief, after respondent had disposed of them cavalierly by the mere assertion that the conflicting cases presented different situations from those in the case at bar. These are conflicts which should be resolved by this Court. It is not at all unusual for this Court to grant certiorari where two decisions conflict "in principle"—and almost never does it have before it conflicting decisions where all the facts were identical.

(2) Under the first specification of error—the Circuit Court of Appeals made a finding of fact upon an issue of fact upon which petitioners were entitled to have had a decision from the Board of Tax Appeals which heard the evidence. The Board had considered it unnecessary to decide this fact, because it was deciding in favor of petitioners on another ground. In reversing the Board on such other ground the Circuit Court of Appeals, under decisions of this Court, should have remanded the case to the Board for finding on the undecided fact rather than substitute itself as trier of the fact. The injustice is aggravated by the fact that the Circuit Court of Appeals made its finding on a record in which a large part of the evidence had been omitted in printing because it was not expected that the Circuit

Court of Appeals would regard itself as a trier of facts, but was expected that if the Court found the record insufficient for affirmance it would at least remand the cause to the Board for further findings on the issue of fact which the Board had failed to resolve.

(3) Respondent's brief, as shown on pages 2 and 3 of petitioners' reply brief, made several indefensible departures from the record facts.

WHEREFORE, petitioners respectfully pray the Court to reconsider its denial of the petition herein, to reexamine the briefs herein—especially petitioners' reply brief, and to grant the petition.

JAMES S. Y. IVINS,
Attorney for Petitioners.

c/o IVINS, PHILLIPS, GRAVES & BARKER,
Southern Building,
Washington, D. C.

November 5, 1942.

I hereby certify that the foregoing petition is presented in good faith and is not filed for purposes of delay.

JAMES S. Y. IVINS,
Attorney for Petitioners.